United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT ISAAC WILLIAMS

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v.

No. 18,462

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VANCE A. FISHER
JOHN B. DENNISTON
701 Union Trust Building
Washington 5, D. C.

Attorneys for Appellant
(Appointed by This Court)

Of Counsel:

GEORGE BLOW
Barco, Cook and Patton
1717 Pennsylvania Avenue, N. W.
Washington, D. C.

Date: May 1, 1964

STATEMENT OF QUESTIONS PRESENTED

Appellant was convicted in a jury trial upon an indictment charging assault with dangerous weapons, a bottle and a bar stool. The questions presented follow:

I. Whether the Court erred in refusing to order the production under the Jencks Act of certain statements of two important government witnesses, transcribed contemporaneously by a government agent, when during an in camera hearing it appeared that the written statements were transcriptions of at least the substance of the witnesses' oral statements and in at least substantially the witnesses' own words.

II. Whether the Court erred in ruling that any error committed in the refusal of production of the statements was harmless, when it appeared that the statements were materially inconsistent with the testimony of the two witnesses, the bartender who shot appellant, and his waitress, at the trial.

BRIEF FOR APPELLANT ISAAC WILLIAMS

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v. No. 18,462

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

TABLE OF CITATIONS

*/ Cases principally relied upon.

Page

*/ Cases principally relied upon.

---

*/ Cases principally relied upon.

STATEMENT OF JURISDICTION

A jury convicted appellant on an indictment charging assault with dangerous weapons, a bottle and a bar stool. A motion for a new trial was denied on June 17, 1963, and appellant was sentenced by the Honorable Henry A. Schweinhaut on June 17, 1963, to from two to six years imprisonment. An appeal was taken to this Court in forma pauperis (Williams v. United States, No. 17,964), and by a decision rendered December 12, 1963, the cause was remanded to the District Court for further proceedings.

Further proceedings were had before Judge Henry A. Schweinhaut on January 24, 1964. Judge Schweinhaut ordered "that the judgment of conviction and the sentence thereon heretofore imposed upon the defendant in this case shall stand" on February 13, 1964, and on the same day granted appellant's motion for leave to appeal in forma pauperis, ordering preparation of the transcript at Government expense. The jurisdiction of this Court is founded upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Following a disturbance at the Starlight Grill, 436 L Street, N. W., on Saturday night, February 9, 1963 (Tr. 13, 181-2)*/ appellant and one Charles L. Hicklin were hospitalized. Tr. 268-9, 324-7. The appellant had a gun shot wound in his left side. Tr. 49. Hicklin had a superficial cut in his left forehead. Tr. 324-7. The appellant had been shot by one Roy Thomas Butler, proprietor of the grill. Two days later Officer Albert G. Manfredi filed a complaint in the District of Columbia Court of General Sessions which charged the appellant with an assault upon Hicklin "with a certain dangerous weapon to wit: a pistol . . .." Whether Butler was charged is not known. Tr. 350-51; GX 3-4. On March 26, 1963, appellant was presented by the grand jury for "Assault with a Dangerous Weapon . . .." Tr. 3-4. In an indictment filed on April 8, 1963, the grand jury charged appellant with an assault on Hicklin "with dangerous weapons, that is, a bottle and a bar stool."

---

*/ Transcript of the trial, May 13-16, 1963. The transcript of the proceedings on remand is designated herein "R. Tr.".

At the trial, which began May 13, 1963, two versions of how Hicklin had been injured were given in testimony. There was testimony that appellant had been drinking and carousing in the bar of the Grill; that Hicklin entered around 11:00 P.M.; that Butler, the proprietor, was behind the bar. Tr. 13, 38, 42, 45. Appellant and a defense witness, James Morton, testified that Butler drew and aimed a gun at appellant; that Butler fired two shots, one of which hit appellant in the side; that appellant had not assaulted Hicklin at the bar, but that he might have collided with Hicklin at the door while attempting to flee Butler's shots. Tr. 206-08, 283-85, 289. Prosecution witnesses testified that appellant assaulted Hicklin with a beer bottle and a bar stool; and that Butler fired to prevent the assault. Tr. 45-49, 156. The examining physician testified that Hicklin's injury consisted of a single laceration, "not very severe." Tr. 326, 328.

Two important Government witnesses at the trial, Butler, the proprietor, and Pauline Smith, his friend and waitress, had testified before the grand jury. Prior to

doing so they gave statements */ to the grand jury clerk with the United States Attorney's office, which were transcribed by the clerk. Counsel for appellant moved for production of both statements. Production was denied, the Court ruling that the statements were not inconsistent with the testimony of the two witnesses at the trial. Tr. 88-90. This Court ordered that further proceedings be had in the light of Campbell v. United States, 368 U.S. 85 (1961), that the grand jury clerk be called and examined, and that the two witnesses themselves be inquired of concerning the producibility of the statements. Williams v. United States, No. 17,964, decided December 12, 1963.

At the remand proceeding, Wilmer R. Stitely, the grand jury clerk; Roy Thomas Butler, the bartender with the gun; and Pauline Smith, his waitress at the time of the incident; were called as witnesses. Testimony was also heard from Donald S. Smith, Assistant United States Attorney for the District of Columbia, presently Chief of

---

*/ Charles R. Hicklin, the alleged victim, also testified before the grand jury and prior thereto gave a statement to the clerk. This statement, however, was produced on motion. Tr. 197-98.

the Grand Jury Section of that office, and Robert X. Perry, Assistant United States Attorney for the District of Columbia, who presented the Williams case to the grand jury. The statements of Butler and Mrs. Smith were introduced into evidence. GX 3-4.

1. The Context of the Taking of the Statements

When a case is scheduled for presentation to the grand jury, the witnesses are ordered to appear in the offices of the United States Attorney in charge of the Grand Jury Division at nine o'clock in the morning. An officer then takes them to one of three persons in the Assistant United States Attorney's office, by whom they are individually interviewed. D. Smith, R. Tr. 19-20; Stitely, R. Tr. 356; F. 5, 6, 8. Their statements are individually taken and recorded on Form USA-9x-65, the form on which the statements were recorded in this case. GX 3-4. The process is a continuing one and while the Assistant presents one case to the grand jury, the administrative personnel are taking down the statements of other witnesses. D. Smith, R. Tr. 22. The administrative personnel thus see witnesses continuously during the morning "one right after another in a case." Stitely, R. Tr. 52-3.

2. The Use of the Statements

The statements as taken down by the grand jury clerk serve three important functions. First, they provide the Assistant United States Attorney presenting the case to the grand jury with exact and particular information as to what the witnesses will say, often the only such information that the Assistant has when he presents the case. D. Smith, R. Tr. 24; Stitely R. Tr. 53, 76-7; F. 10, 11(a). Second, they provide the trial Assistant United States Attorney with "accurate information" in preparing the case for trial. Perry, R. Tr. 26, F. 11(c). Third, they are the sole basis of information concerning the case to the clerk who actually drafts the indictment, as the grand jury testimony is generally not typed. Perry, R. Tr. 124-7; Stitely, R. Tr. 46-7, 53; F. 11(b).

3. The Qualifications of the Agent

The statements of Smith and Butler in this case were taken by Mr. Wilmer R. Stitely, Chief Clerk of the Grand Jury Division of the United States Attorney's office. Mr. Stitely has over thirty years of experience in this field, and is a law school graduate with a government

rating of Grade 9. Stitely, R. Tr. 33-4, 37-8, 50-1; F. 14. His principal duties consist of the taking of such statements. Stitely, R. Tr. 14, 35; F. 14.

4. The Time Factor

Mr. Stitely interviews perhaps ten witnesses during the course of the morning in rapid succession. Stitely, R. Tr. 33-4, 52-3. He thus sees ten witnesses during three hours, or 18 minutes per witness. The average length of the statements here under consideration is 300 words (GX 3-4), representing an average transcription rate of nearly 20 words per minute over the entire duration of the interview.

Mr. Stitely may let a witness finish his statement and then type his transcription, to save carrying the whole statement in mind, or he may cut them off half way through their narrative and transcribe that portion, subsequently transcribing the remainder. Stitely, R. Tr. 36, 66-7, F. 9. Though he ordinarily listens to the witnesses and then types (R. Tr. 48), in this case Mr. Stitely was typing while the witnesses were giving their statements. Butler, R. Tr. 96, 98; P. Smith, R. Tr. 113.

5. The Transcription of the Statements

Mr. Stitely had been instructed by his superior to type on every such statement a recital that it is "a summary of the witness' conversation not read to or by the witness," and that it is "not intended to be a substantially verbatim account." Accordingly, he testified that his transcriptions were not "substantially verbatim." Stitely, R. Tr. 48, 62-4; F. 7, 13. He explained, however, that by "substantially verbatim" he meant precisely verbatim. Stitely, R. Tr. 54; F. 13. He also insisted that he wrote his "version" of their narrative (Stitely, R. Tr. 48, 55-60), but he further explained that by "his version" he simply meant that he used the third person rather than the first person. Stitely, R. Tr. 48-9.

Mr. Stitely feels, however, that these statements are important, and he accordingly tries to transcribe accurately the essentials of what he hears. Stitely, R. Tr. 53. He thus never transcribes anything that the witness does not say. Stitely, R. Tr. 58-9. It is his purpose, moreover, to record the substance of what the witnesses tell him. Stitely, R. Tr. 59. Compare Butler, R. Tr. 105-09 and P. Smith, R. Tr. 114-15; F. 20.

The statements were in substantially the witnesses' own words. Mr. Stitely would never change the witnesses' words if to do so would materially alter the purport of their statements. Stitely, R. Tr. 60; F. 19. Both the witnesses Butler and Mrs. Smith testified, moreover, that their respective statements were substantially in their own words. Butler, R. Tr. 109; P. Smith, R. Tr. 116.

Mr. Stitely, in his quest for accuracy, made a correction on the statement of Butler after verifying that he had transcribed a portion of the witness' statement incorrectly. Stitely, R. Tr. 70-1; F. 15. He also used quotation marks to indicate quoted matter in the witness' statement. Stitely, R. Tr. 49-50; GX 3-4. He accurately transcribed the profane or obscene utterances of the witnesses, abbreviating the expressions. Stitely, R. Tr. 57-8, Butler, 108-09; F. 16.

The Assistant United States Attorneys who testified stated that had material inconsistencies appeared between the statements of the witnesses Smith and Butler and the testimony they gave before the grand jury, the written statements would have been corrected.

D. Smith, R. Tr. 30. The corrections are made so that the trial Assistant will have accurate information in preparing for trial. Perry, R. Tr. 26. Certain corrections were made on the statement in the present case, but they were minor. Perry, R. Tr. 119-20; GX 3-4; cf. F. 12. As Mr. Smith testified, it is a rare case when such a change need be made. R. Tr. 31.

However, the District Court concluded that, though the statements were recorded contemporaneously with their making, neither was a substantially verbatim recital of the witnesses' respective oral statements. F. 19; Conclusion 3. It further held that the statements were not signed or otherwise adopted by the witnesses. F. 17; Conclusion 2. It determined that assuming arguendo they were producible, no prejudice resulted to defendant as a result of not having the statements at the trial. F. 23-25; Conclusion 4.

STATUTE INVOLVED

Jencks Act, 18 U.S.C. § 3500:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testifed on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion

> a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT OF POINTS

1. Where two government witnesses' statements to a government agent were recorded contemporaneously by the agent, and where the recordation contained at least the substance of the witnesses' remarks and in at least substantially the witnesses own words, the court should have ruled them to be producible under subsection (e)(2) of the Jencks Act. The court thus erred in holding them not producible. */

2. Where the government witness who shot appellant, and his waitress, both testified at the trial on material matters inconsistent with their statements to the government agent as recorded by him, the trial court erred in holding that any erroneous denial of production of the statements was harmless error. */

---

*/ With respect to Points 1 and 2, which are interrelated, appellant desires the Court to read the entire transcript on remand and respectfully refers the Court to such portions of the trial transcript as are specifically cited in the Statement of the Case and the Argument on both points.

SUMMARY OF ARGUMENT

I

1. At the remand proceeding two key witnesses were shown to have given oral statements to the grand jury clerk prior to their testifying before the grand jury. The statements were recorded on a typewriter simultaneously with their utterance. The statements were shown to have been relied upon by the Assistant United States Attorney when he presented the case to the grand jury, by the indictment writer in the drafting of the indictment, and perhaps by the Assistant United States Attorney at trial. They were taken by an agent who was a law school graduate and who had long years of experience in taking such statements. They were transcribed at an average rate of approximately twenty words per minute over the entire duration of the interview. The testimony of the agent and the two witnesses whose statements were taken made it clear that at least the substance of their oral statements was recorded. Moreover, it was clear that substantially the witnesses' own words were recorded, including ungrammatical constructions, obscenities, and quotations of hearsay statements of others. Nevertheless,

the District Court erroneously ruled that the statements were not "substantially verbatim" within the meaning of subsection (e)(2) of the Jencks Act, and thus not required to be produced. This conclusion is clearly erroneous.

II

A critical issue at the trial was the credibility of the witnesses. The prosecution and the defense each presented corroborated versions of the incident, but they differed drastically. The witnesses whose statements are here under consideration were key witnesses for the prosecution: Butler, the bartender with the gun, who shot appellant, and Pauline Smith, his waitress. Both witnesses were thus vitally interested in the outcome of the case, as a finding of appellant's guilt would insure that Butler would not be prosecuted for shooting him.

The statements of Butler and Smith were materially inconsistent with their testimony before the jury in several important particulars. The utility of such statements to defense counsel during trial cannot be precisely evaluated; thus the Supreme Court has repeatedly ruled that the denial of production of inconsistent statements cannot be harmless error. Under the circumstances of this case,

however, the utility of the statements is clear. For both reasons, therefore, the District Court's ruling that the denial of production of the qualified statements was not prejudicial, is error.

ARGUMENT

I. THE DISTRICT COURT'S FINDING THAT THE STATEMENTS GIVEN TO THE GRAND JURY CLERK BY TWO KEY GOVERNMENT WITNESSES WERE NOT PRODUCIBLE UNDER THE JENCKS ACT AS SUBSTANTIALLY VERBATIM STATEMENTS RECORDED CONTEMPORANEOUSLY WITH THEIR MAKING IS CLEARLY ERRONEOUS

Although this Court has on numerous occasions dealt with questions arising under the Jencks Act,[1/] it has never had occasion to define the standards under which production will be required. Though the Supreme Court cases are not explicit in their directions, perhaps the

---

1/ 18 U.S.C. § 3500, 71 Stat. 595 (1957). The cases are as follows: Alexander v. United States, ____ U.S. App. D.C. ____, ____ F.2d ____ (1964); Moore v. United States, ____ U.S. App. D.C. ____, 328 F.2d 555 (1964); Williams v. United States, ____ U.S. App. D.C. ____, 328 F.2d 178 (1963); Saunders v. United States, 114 U.S. App. D.C. 345, 316 F.2d 346 (1963) and ____ U.S. App. D.C. ____, 323 F.2d 628 (1963); Hilliard v. United States, 115 U.S. App. D.C. 86, 317 F.2d 150 (1963); Harrison v. United States, 115 U.S. App. D.C. 249, 318 F.2d 220 (1963); Bowser v. United States, 115 U.S. App. D.C. 302, 318 F.2d 273 (1963); Leach v. United States, 115 U.S. App. D.C. 351, 320 F.2d 670 (1963); Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960); McGill v. United States, 106 U.S. App. D.C. 136, 270 F.2d 329 (1959), cert. denied, 362 U.S. 905 (1960); Borges v. United States, 106 U.S. App. D.C. 139, 270 F.2d 332 (1959), cert. denied, 361 U.S. 971 (1960).

most pertinent consideration appears in Palermo v. United States, 360 U.S. 343, 350 (1959): whether the statement is such that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own . . . ."

Accordingly, the decisions of other courts must be looked to for guidance. A leading case and perhaps the only one collecting the criteria for production of documents under clause (e)(2) of the Jencks Act is United States v. McKeever, 271 F.2d 669, 674-5 (2d Cir. 1959). It sets forth certain factors for consideration in determining whether a report is "substantially verbatim": (1) the extent to which it conforms to the language of the witness, (2) the length of the report in comparison to the length of the interview, and (3) the lapse of time between the interview and its transcription. The Court went on to say:

> "In every case, however, the statute must be interpreted with a mind to the fact that only a substantially verbatim, not a precisely verbatim, recital of the witness' pre-trial oral statement is required; and the recording made of this statement . . . need be only contemporaneously, not simultaneously made." (p. 675, emphasis added.)

See also United States v. Waldman, 159 F. Supp. 747, 749 (D.N.J. 1958):

> "Of course, by the 'substantially verbatim recital', 'verbatim' is not meant. It need not be word for word. It need not use exactly the words of . . . [the witness], nor must . . . [the witness'] words be used in their exact grammatical phrasing. That would prevent the use of any narrative statement. What is meant is, that the statement should give the substance of what . . . [the witness] said; should give it, so far as the substance is concerned, substantially in . . . [the witness'] words."

Thus, only the substance of the witness' testimony is required, and, so far as the substance is concerned, it need be only in substantially the witness' words.

The Supreme Court cases, however, do indicate the propriety of such criteria; e.g., Campbell v. United States, 365 U.S. 85 (1961) and 373 U.S. 487 (1963). Those cases involved the statement of a witness given to a Government agent who, though he had great experience in taking statements, did not purport to stenographically transcribe them. If, as the Supreme Court assumes, a non-stenographic statement by a Government agent meets the standards of the statute, something less than "precisely verbatim" must suffice. See also Palermo v.

United States, 360 U.S. 343, 352 (1959). Thus the tests laid down in the McKeever and Waldman cases are clearly authoritatively grounded. They are also justified by the broad construction given the statute in the Campbell case.

In this case, it is clear that not only was the substance of the statements of Roy Thomas Butler and Mrs. Pauline Smith recorded contemporaneously, but substantially in their own words. They should, therefore, have been held producible under clause (e)(2).

The facts are stated herein in some detail because of the importance of this question in the Court's administration of justice in the District of Columbia. A decision that the denial of the production of statements given the grand jury clerk daily in this Circuit violates the Jencks Act should have a sound basis in fact. They are as follows.

A. The Purposes of the Statements

The purposes for which the statements are taken attest to their accuracy and reliability. First, they give the Assistant United States Attorney presenting the case to the grand jury "an idea . . . of exactly what the

particular information is the witness may have . . .." D. Smith, R. Tr. 24. Such statements are ordinarily the only witness information that the Assistant has when he presents the case. D. Smith, R. Tr. 24. Or, as stated by Mr. Stitely, who took the statement in this case, "it gives the members of our office a chance to see what the case is all about when the witnesses are not there, they do not have access to the witnesses." Stitely, R. Tr. 53. See also Stitely, R. Tr. 76-7; F. 10, 11(a). The Assistant who presents the case to the grand jury thus questions the witnesses solely on the basis of these statements. Smith, R. Tr. 22-3.

A second purpose of the statement, as testified to by Mr. Robert X. Perry, the Assistant United States Attorney who presented the Williams case to the grand jury, is to provide the trial Assistant United States Attorney with "accurate information" in preparing the case for trial.[2/] Perry, R. Tr. 126; F. 11(c). The statements may, on occasion, be used to impeach the witnesses. See D. Smith, R. Tr. 32; F. 11(c).

2/ Statements transcribed for this purpose have previously been held producible under the Act. United States v. Aviles, 200 F. Supp. 711 (S.D.N.Y. 1961), appeal pending per Evola v. United States, 375 U.S. 32 (1963) (the Solicitor General conceding the statements were producible. Brief for United States, p. 36.)

The third purpose of the statement is to provide the clerk who drafts the indictment with the necessary information to prepare it, as the grand jury testimony of the witnesses is not generally typed (nor was it in this case). Perry, R. Tr. 124-27; Stitely, R. Tr. 46-7, 53; F. 11(b). The indictment writer thus sees only the statement the grand jury clerk takes. The indictment writer must of course have sufficient detail in the statements to determine accurately the exact nature of the alleged crime.

A statement which is to be the sole basis of witness information to the Assistant presenting the case to the grand jury is likely to be characterized by a high degree of accuracy. The accuracy of the statement is also demonstrated by its service as a guide to the trial Assistant who presents the case at trial. Perry, R. Tr. 126, F. 11 (c). No less significant is the fact that the indictment, which must be drawn with great accuracy, is prepared <u>solely</u> on the basis of statements such as those in this case. Were such statements not the substance of the witnesses' testimony in substantially the witnesses' own words, they would ill serve their three primary functions.

Moreover, the fact that only minor corrections were made on the statements by Mr. Perry when he presented the Williams case to the grand jury also attests to their original accuracy.

Mr. Donald S. Smith, an Assistant United States Attorney in charge of the Grand Jury Division, whom Government counsel attempted to qualify as an expert witness (R. Tr. 17-18), testified that if he were presenting the case to the grand jury, and the witness would say something contrary to what appeared on the statement, he would "put a note right on the statement correcting it." Smith, R. Tr. 29. He "then customarily . . . would make a handwritten note and . . . might even cross out part of the witness' statement by running a penline through it and add further information in the margin." If there were material variances between the testimony of the witness and the statement, he would question the witness about it and then make the correction. D. Smith, R. Tr. 30; cf. F. 12.

Mr. Perry, who presented this case to the grand jury, explained that a statement is corrected by the Assistant "so that the trial Assistant will have the

accurate information before him in preparing the case for trial." Perry, R. Tr. 26. Accordingly, Mr. Perry made certain minor corrections on the witnesses' statements in the present case. Perry, R. Tr. 119-20; GX 3-4; F. 12; cf. Stitely, R. Tr. 58.

The fact that no other corrections were made, and the fact that they would have been made had material discrepancies appeared, is further witness to their accuracy.[3/] The close scrutiny by the Assistant United States Attorney of the witnesses' statements while they were testifying before the grand jury, which might have helped to insure that they would in fact be substantially verbatim statements, was here unnecessary: the statements already were substantially verbatim. No corrections of substance needed be, nor in fact were, made. Indeed, as stated by Mr. Smith, the other Assistant United States Attorney who testified in this proceeding, such statements are highly reliable:

> "I can't remember when I had occasion to make such a change . . .. This does not

---

3/ Butler testified that he did not change his testimony from that given on the statement when he testified before the grand jury. Butler, R. Tr. 103.

> appear very often. . . . [I]t is not a common occurrence, and I can't remember the last time I had occasion to do such a thing." R. Tr. 31 (emphasis added).

Statements which demonstratedly serve these three important functions with such accuracy clearly are not such as to make it "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own . . .." Palermo v. United States, 360 U.S. 343, 350 (1959).

B. The Qualifications of the Transcribing Agent

The statements in this case were taken by Mr. Wilmer R. Stitely, for the last four or five years chief clerk of the Grand Jury Division of the United States Attorney's office in the District of Columbia. Stitely, R. Tr. 33-4, 37-8; F. 14. He has been a clerk in that office since 1931 (Stitely, R. Tr. 33-4; F. 14), and is a law school graduate with a government employment rating of Grade 9. Stitely, R. Tr. 50-1; F. 14. His principal duties are the taking of these statements (Stitely, R. Tr. 14, 35; F. 14), and he has "long years of experience" in doing so. D. Smith, R. Tr. 20.

As stated by the Supreme Court in Campbell v. United States, 373 U.S. 487, 495 (1963), a court is

> "entitled to infer that an agent . . . of some 15 years' experience would record a potential witness' statement with sufficient accuracy as to obviate any need for the courts to consider whether it would be 'grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own.'"

This Court is entitled, a fortiori, to infer that an agent of over thirty years' experience would record a potential witness' statement with such accuracy.

C. The Absence of a Lapse of Time in the Transcribing of the Statements

Not only were the statements here transcribed so intimately in time with their making as to require a finding that they were contemporaneously recorded within clause (e)(2) of the Jencks Act,[4/] they were recorded so contemporaneously as to give rise to an inference that they were substantially verbatim. There was no time for observations and comments of the agent, cf. Borges v. United States, 106 U.S. App. D.C. 139, 270 F.2d 332 (1959), cert. denied, 361 U.S. 971 (1960); Palermo v. United States, 362 U.S. 343, 353 (1959); Johnson v. United States, 269 F.2d

---

4/ The District Court so found (Conclusion of Law 3), and there can be no serious issue on this point. United States v. Waldman, 159 F. Supp. 747, 749 (D. N.J. 1958).

72, 74 (10th Cir. 1959). There was time only for the agent to act as a virtual conduit of information.

Mr. Stitely testified that he generally follows one of two procedures in taking the witnesses' statements. He may let the witness finish telling him "all about it," and then write his transcription, or, if the statement is "real long," he will cut them off half way through their narrative. "I'll write that much down," he testified, "and then I'll return to them and take the questions about the rest of the statement and then turn and write the rest of it down." Stitely, R. Tr. 36; F. 9. He will ordinarily listen to the witness and then type. R. Tr. 48. He determines the necessity for stopping in the midst of a statement thus:

> "Well, if the witness has a long statement, I may decide to take just what the witness talked about -- give the name and address and talk about the preliminary part first -- then I'll write all that down. Then I turn back and go to the last part of the statement, and turn back and write the last of it down. <u>That saves me carrying in mind the whole statement that the witness has given me</u>." Stitely, R. Tr. 66-7 (emphasis added).

He takes the statement rapidly, typing very quickly. Thus typographical errors creep into the narrative. See Stitely, R. Tr. 74.

In the present case, however, both witnesses whose statements were taken made it clear that Mr. Stitely was typing while they were giving their statements. Butler, R. Tr. 97, 98; P. Smith, R. Tr. 113.

Thus the simultaneity of the transcription in itself gives a strong basis for inference that the statements were "substantially verbatim." United States v. McKeever, 271 F.2d 669, 674-5 (2d Cir. 1959).

D. The Length of the Statement in Relation to the Length of the Interviews

Mr. Stitely testified that he interviews the witnesses individually, seeing perhaps ten witnesses in three to five cases in the course of a morning, interviewing them "one right after another in a case." Stitely, R. Tr. 33-4, 52-3. Thus during a three-hour morning Mr. Stitely has, on the average, 18 minutes per witness.

The Supreme Court has indicated the propriety of considering the ratio of length of the statement in relation to the length of the interview.[5/] The two statements here under consideration average 300 words in length,

---

5/ Palermo v. United States, 360 U.S. 343, 355 n.12 (1959), 3 1/2-hour interview, 600-word statement, held too selective. Compare United States v. Annunziato, 293 F.2d 373, 381 (2d Cir. 1961), cert. denied, 368 U.S. 919 (1961), 3-hour interview, 800-word statement.

Butler's being slightly over 400 words and Smith's being over 200 words. This represents 600 words of interview, transcribed in a total interview time of approximately 30 minutes, or an average of nearly 20 words per minute over the entire duration of the interviews. Clearly such rapid and obviously complete transcription in itself justifies a strong inference that the witness' testimony was recorded "substantially verbatim." United States v. McKeever, 271 F.2d 669, 674-5 (2d Cir. 1959); see Palermo v. United States, supra at 355 n.12.

E. The Transcription of at Least the Substance of the Oral Statements

From the facts as to which Mr. Stitely and the two trial witnesses testified, it is clear that he transcribed at least the substance of the two witnesses' testimony. First, Mr. Stitely, knowing the uses to be made of the statements, properly felt that they were important, and as to the essentials he tried to transcribe accurately what he heard. Stitely, R. Tr. 53. Thus if Mr. Stitely has some question about whether or not he has an accurate rendition of a witness' testimony, he will inquire of the witness as to whether he has it right. In one instance

during his interview with Mr. Butler, Mr. Stitely had typed "he threw a glass of beer on the floor and broke the bottle and glass." Mr. Stitely changed this on his typewriter. Explaining, he stated:

> "Well, as I recall it now, in writing that -- you write so fast -- I put it down, and then I hesitated, because I wasn't sure about that part. I might have at that time turned to the witness to verify, and he made the correction which I made there. See." (Emphasis added.)

Accordingly, he changed the sentence so that it read "he threw a glass of beer on the floor and the bottle too."[6/] Stitely, R. Tr. 70-71; F. 15. Mr. Stitely also added to the statement in pen the words "and bar stool" and "dangerous man" at the top of the first page. GX 3-4; Stitely, R. Tr. 44. Such immaterial corrections as these evidence that he recorded even more than the "substance" of the witnesses' testimony; they reveal an attention to their every word.

6/ Indeed, at least this portion of the statement properly should be deemed "adopted" within the rule of the second Campbell case, 373 U.S. 487 (1963). The "verification" process necessarily would involve Mr. Stitely's reading at least that portion back to the witness, asking him if he had it right, and then conforming the statement to the oral version he had just checked with the witness.

In any event, corrections such as this provide strong inference that the statement is substantially verbatim. United States v. Tomaiolo, 280 F.2d 411, 413 (2d Cir. 1960).

Second, Mr. Stitely never writes down anything the witness does not say. He transcribes only what the witness does say. Stitely, R. Tr. 58-9. This then is not a case in which the transcript is replete with comments, interpolations and ideas of the interviewer, e.g., Johnson v. United States, 269 F.2d 72, 74 (10th Cir. 1959). Only the testimony of the witnesses appears.

Third, he testified that it was his purpose to record the "essential part," the "heart," the "substance," the "material part," of what the witnesses say to him. Stitely, R. Tr. 55, 59, 62. "I'm only concerned with the substance of what they say." Stitely, R. Tr. 77. Substance, however, is all the statute requires. United States v. McKeever, 271 F.2d 669 (2d Cir. 1959); Campbell v. United States, 373 U.S. 487, 489 (1963) ("complete . . . with respect to the pertinent information"); United States v. Papworth, 156 F. Supp. 842, 853 (N.D. Tex. 1957), aff'd on other grounds, 256 F.2d 125 (5th Cir. 1958), cert. denied, 358 U.S. 854 (1958).

Fourth, both witnesses whose statements are here under consideration also testified that Mr. Stitely's transcription of their statements, which was read to them,

reported the substance of their testimony. Butler, R. Tr. 105-09; P. Smith, R. Tr. 114-15; F. 20.[7] Indeed, the statement of Mrs. Smith itself recites that it is the "substance" of her testimony. GX 3-4; F. 22. Clearly, at least the substance of the witnesses' oral statements was recorded.[8]

F. The Use of Substantially the Witnesses' Own Words

Mr. Stitely transcribed the statements in substantially the witnesses' own words. He testified that he would never change the witnesses' words where to do so

---

7/ Mrs. Smith asserted self-servingly that there was an inaccuracy in the report of Mr. Stitely. P. Smith, R. Tr. 115-16. Her challenge was self-serving because her oral statement was thus made to conform to her testimony at the trial. This would, of course, tend to strengthen her trial testimony, which at the trial corroborated Mr. Butler's version of the occurrence at the bar, which in turn tended to justify his conduct in shooting Williams. As stated in Campbell v. United States, 365 U.S. 85, 97 (1961), "[r]eliance upon the testimony of the witness based upon his inspection of the controverted document must be improper in almost any circumstances." Such testimony is "obviously self-serving." P. 98. As stated in Ogden v. United States, 303 F.2d 724, 737 (9th Cir. 1962), "the witness can normally be of little assistance."

8/ Mr. Stitely was however visibly concerned lest it so be found, for he had been instructed by his superior, Mr. Alexander Stevas, then Assistant United States Attorney in charge of the Grand Jury Division, to type on every statement,

/cont'd

would materially alter the purport of the witnesses' statements.[9] Stitely, R. Tr. 60; F. 19. The witnesses Butler and Mrs. Smith testified that their respective

---

8/ (cont'd)

> "The following is a summary of the witness' conversation not read to or by the witness. It is not intended to be a substantially verbatim account." R. Tr. 62-4; F. 7; cf. GX 3-4.

Thus he testified that his transcription of the witnesses' statements was not "substantially verbatim." Stitely, R. Tr. 48; F. 13. In view of his instructions, such testimony is to be expected. Mr. Stitely's interest is obvious.

However, he did not well understand his instructions. First, he explained that by "substantially verbatim" he meant exactly, completely and precisely verbatim. Stitely, R. Tr. 54; F. 13. It can no longer be argued that the Act requires that statements be precisely verbatim. Palermo v. United States, 360 U.S. 343, 352 (1959); Campbell v. United States, 373 U.S. 487 (1963); United States v. McKeever, 271 F.2d 669 (2d Cir. 1959). Stenographic accuracy is unnecessary. Mr. Stitely's conclusion, therefore, must be rejected.

9/ It is true that he insisted on occasion that he wrote only his "version" of their narrative. Stitely, R. Tr. 48, 55-60. As he stated, "Well, it is supposed to be my version of their statements." R. Tr. 59. (Emphasis added.) Again, in view of his instructions, such testimony is expected; his interest is obvious.

This assertion does not negate the producibility of the transcription, for, as he explained, by "his version" he meant simply that he endeavored to use the third person rather than the first person. R. Tr. 48-9. That statements are recorded in the third person rather than

/cont'd

statements were substantially in their own words.[10/] Thus, Mr. Stitely used quotation marks to indicate a quotation in Butler's statement of what appellant said to Butler, for the purpose of showing an exact quotation. Stitely, R. Tr. 49-50; GX 3-4. He was also careful to transcribe the profanity and obscenities of the witnesses, albeit he abbreviated the expressions.[11/]

9/ (cont'd) the first person does not thus constitute them other than "substantially verbatim," although it would of course bring them outside a criterion of "precisely verbatim." See Campbell v. United States, supra.

10/ "Q. Is that the way you said it, or are these somebody else's words? A. That's the way I said it. I said it." Butler, R. Tr. 109; P. Smith, R. Tr. 116 ("pretty much" in her own words). Indeed, this, together with the witnesses' admission (noted above) that the statements contained the substance of their testimony, might properly constitute sufficient "adoption" of the statements so that they would be required to be produced under clause (e)(1) of the Act. See Campbell v. United States, 373 U.S. 487 (1963).

11/ I.e., Butler's statement:
"you bad SB you put me out",
". . . said he was a bad SB",
". . . you MF I am going to get you". GX 3-4; Stitely, R. Tr. 57-8; Butler, R. Tr. 108-09; F. 16.

He also transcribed the errors in grammar in the utterances of the witnesses.[12] In view of Mr. Stitely's impressive educational qualifications and long years of experience in taking statements, such ungrammatical construction or errors of syntax in the statements as transcribed clearly have as their source the language of the witnesses, not the language of Mr. Stitely, whose testimony is strikingly free from such errors. Thus, in addition to Mr. Stitely's and the witnesses Smith and Butler's assertions that the oral utterances of the witnesses were transcribed in substantially their own words, certain of their testimony was recorded in precisely their own words.

Additional such exact transcriptions are very likely. Mr. Stitely testified generally as to his modus

---

12/ Thus, Mr. Stitely transcribed in Butler's statement (GX 3-4):

> "and then Dft. Williams goes back again and hit Hicklin" (sic),

and he transcribed in Mrs. Smith's statement (GX 3-4)

> "there was no words passed between them" (sic),

and

> "he was going to get him" (sic) (emphasis added).

Compare Butler, R. Tr. 99:

> "he came over and sit right in front of me",
> "he come up" (sic) (emphasis added).

operandi in taking statements. Explaining his procedure, he stated that, hearing the testimony "I hit him," he would write "he hit the witness." For the testimony "it was about 5:00 o'clock in the evening, and I went down there to see what was happening and I saw this man," he would write "he saw the man about 5:00 in the evening." Stitely, R. Tr. 60. If he were to write the words "a bottle of beer", for example, those would be the exact words of the witness. Stitely, R. Tr. 76.

The statements were, it is true, taken for the most part in the third person and in narrative form. However, that factor in itself does not preclude the statements from being substantially in the witnesses' own words and thus required to be produced as substantially verbatim recitals. Campbell v. United States, 365 U.S. 85 (1961) and 373 U.S. 487 (1963). The statement in question in that case, set forth at 365 U.S. at 90-91, n.3, was in narrative form and in the third person; yet the Court found that it was required to be produced under the statute.

Though the clause of the statute considered was (e)(1), dealing with adopted statements, the purpose of the statute in both clauses (e)(2) and (e)(1) is clearly the same:

> ". . . Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." Palermo v. United States, 360 U.S. 343, 352 (1959).

Thus the court in United States v. Papworth, 156 F. Supp. 842, 853 (N.D. Tex. 1957), aff'd on other grounds, 256 F.2d 125 (5th Cir. 1958), cert. denied, 358 U.S. 854 (1958), properly ruled that third person narrative statements were producible under clause (e)(2). And as stated in Palermo v. United States, 360 U.S. 343, 352 (1959): "the statute was meant to encompass more than mere automatic reproductions of oral statements." A shorthand, precisely verbatim transcription thus was held unnecessary. Compare United States v. Waldman, 159 F. Supp. 747, 749 (D. N.J. 1958).

> "The Congress was interested in covering all reasonably accurate statements. It certainly did not mean to say that an agent who did not write shorthand, or did not have a mechanical recording machine handy, was per se inaccurate."

Further, were third person statements not producible, even a stenographic transcription could be deliberately brought outside the statute by the simple substitution on transcription of "he" for "I."

G. The District Court's Findings

After making the many and detailed findings above referred to, the District Court entered a concluding finding of fact:

> "19. The evidence shows that the statements taken by Mr. Stitely were not substantially verbatim, but were merely Mr. Stitely's summary of the witnesses accounts of the crime and contained only the substance, essentials and highlights of the account. The statements were written in a third person narrative, and not in the language of witnesses Butler or Smith, except where quotation marks appear. . . . It was not the intention of the Clerk to take full detailed statements, but only sufficient facts so that the Assistant United States Attorney appearing before the Grand Jury could make an orderly presentation."

It then concluded as a matter of law:

> "3. Both statements were 'recorded contemporaneously' with their 'making', however, neither was 'a substantially verbatim recital of an oral statement made by' the witness within the meaning of Subsection (e)(2) of the Jencks Act, and thus were not producible at trial."

Both the finding and the conclusion are, for the reasons shown above, clearly erroneous.[13/]

13/ The Court also appeared unwilling to accord appellant a new trial because of its conviction that appellant was, after all, guilty:

/cont'd

First, the Court thus found that the statements "were merely Mr. Stitely's summary of the witnesses accounts of the crime . . .." This finding is without evidentiary support. It is true that Mr. Stitely testified that he transcribed "just the highlights" (Stitely, R. Tr. 15), but by highlights he meant "substance." Butler, R. Tr. 77; cf. R. Tr. 55, 59, 62. Moreover, the extent of detail recorded and the fidelity of its transcription transcends the concept of substantiality and

---

13/ (cont'd)

> "I remember this case, and I think it would be an absolute miscarriage of justice if he goes unwhipped by justice which, if I grant the relief you seek, would be the case. . . . I think that even to grant a new trial would represent a miscarriage of justice, and I am not willing to do it." Judge Schweinhaut, R. Tr. 88-9. (Emphasis added.)

To have permitted such a factor to have influenced the Court's decision would have been error for, as stated by the Supreme Court in Bollenbach v. United States, 326 U.S. 607, 615 (1946):

> ". . . the judicial pendulum need not swing to presuming all errors to be 'harmless' if only the . . . court is left without doubt that one who claims its corrective process is, after all, guilty."

See Part II, infra.

borders upon minutiae. The substance of the statement is, in any event, as shown above, all the statute requires.

Second, the Court found that the statements "were written in the third person narrative . . .." This is partially true. But the further finding, "and not in the language of witnesses Butler and Smith, except where quotation marks appear", is clear error. As shown above,[14] Mr. Stitely transcribed the statement substantially in the witnesses' own words, including grammatical errors and obscene phrases. Thus this portion of the finding is grounded, if at all, upon the erroneous conclusion that third person narrative statements cannot be substantially verbatim.

> "It is perfectly clear from the statement itself that it is not his language. It doesn't say, 'I was working at the bar of my grill.' . . . It says that, 'He was working at the bar of his grill.' That is Mr. Stitely talking about this witness." Judge Schweinhaut, R. Tr. 109 (emphasis added).

This, of course, does not prevent the statement from being substantially verbatim.[15] United States v. Waldman,

---

14/ Pp. 31-6, supra.

15/ See p. 35, supra.

159 F. Supp. 747, 749 (D. N.J. 1958). Compare United States v. McKeever, 271 F.2d 669, 674-5 (2d Cir. 1959); Palermo v. United States, 360 U.S. 343, 352 (1959); Campbell v. United States, 373 U.S. 487 (1963); United States v. Papworth, 156 F. Supp. 842, 853 (N.D. Tex. 1957), aff'd on other grounds, 256 F.2d 125 (5th Cir. 1958), cert. denied, 358 U.S. 854 (1958). The Court thus erred.

Third, the Court relied on the "intention of the Clerk" "not . . . to take full detailed statements . . .." Whatever Mr. Stitely's self-servingly asserted intentions, what he did is beyond question. He recorded at least the substance of the statements, and in at least substantially the witnesses' own words.

Moreover, as shown above, the District Court's ultimate finding and conclusion are inconsistent with its subsidiary detailed findings and the evidence underlying them. Indeed, the Court itself indicated doubt on the matter. "I think there may be some question about whether it is a Jencks-type of statement." R. Tr. 90. See also R. Tr. 80-1, 88. As shown above, the subsidiary findings and the evidentiary basis for them compel a conclusion that the statements of Smith and Butler are substantially

verbatim recitals of their oral statements. Accordingly, Finding 19 as set out above is clearly erroneous and cannot stand. See Campbell v. United States, 373 U.S. 487 (1963). With it Conclusion 3 must also fall. The denial of production of the statements of Butler and Mrs. Smith was therefore error.

II. THE CONCLUSION OF THE DISTRICT COURT THAT THE DEFENDANT SUFFERED NO PREJUDICE BY THE WITHHOLDING AT TRIAL OF THE JENCKS ACT STATEMENTS IS ALSO ERRONEOUS

A. Withholding a Jencks Act Statement Does Not Constitute Harmless Error When There Is Any Difference Between a Statement and the Trial Testimony of a Witness.

The Supreme Court has been and remains the initiating and controlling source of authority on the necessity of furnishing to the defense at trial Jencks Act statements. In the now historic case which announced this requirement as one of the standards for the administration of criminal justice in the federal courts, the reason for the importance of the requirement was articulated by the Court:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The diversion from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony." Jencks v. United States, 353 U.S. 657, 667 (1957).

Since in that case the reports had been made by two witnesses whose testimony was crucial to the Government's case, no analysis of prejudice was entertained in requiring reversal and a new trial. Id. at 667, 672. Mr. Justice Burton, concurring, had argued that a new trial should not have been ordered: that the necessity for a new trial should depend on the contents of the reports and that, if the reports did not in the trial judge's view on remand contain contradictory or exculpatory material, then no prejudice requiring a new trial would have resulted from their erroneous denial. All these arguments were implicitly rejected by the opinion of the Court. Id. at 678.

The Jencks Act, 18 U.S.C. § 3500 did not derogate the compelling force of this Jencks principle or affect this ruling of the Court as to the prejudicial nature of the denial to the defense of properly qualified statements. Congress intended only to define and limit by statute the scope of statements which do qualify, so as to exclude the work product of Government agents or other documents in whose non-disclosure there was a strong public interest. The Jencks holding that a defendant on trial should be entitled to statements of Government witnesses who testify against him, regardless of a judge's opinion as to how

useful they might be on cross-examination, was explicitly reaffirmed. S Rep. No. 981. 85th Cong., 1st Sess. 3 (1957); H.R. Rep. No. 700, 85th Cong., 1st Sess. 3-4 (1957); Campbell v. United States, 373 U.S. 487, 497 n. 12 (1963); Campbell v. United States, 365 U.S. 85, 92 (1961); Palermo v. United States, 360 U.S. 343 (1959). The terms of the statute are thus mandatory in this regard.[16/] Campbell v. United States, 365 U.S. 85, 92 (1961).

In one and only one situation has the Supreme Court carved out an exception to the Jencks holding that the improper denial of a statement is prejudicial and automatically requires a new trial. In Rosenberg v. United States, 360 U.S. 367 (1959), the Court upheld a ruling of the Court of Appeals for the Third Circuit that the trial judge had erred in failing to deliver to the defendant a certain document but that the error was harmless. The qualified document involved was a letter written to the Assistant United States Attorney by a complaining witness, stating that her memory had dimmed in the three years since

---

16/ 18 U.S.C. § 3500(b): ". . . [T]he court shall order it to be delivered directly to the defendant for his examination and use." (Emphasis added.)

the commission of the crime and that to refresh her failing memory she would have to reread an original statement which she had given to the F.B.I. The admission that the witness had in fact so refreshed her memory, however, had already been obtained explicitly from the witness at the trial during cross-examination. See Appendix to Opinion of the Court, 367 U.S. at 371-74. In this unusual circumstance[17/] the Court stated:

> "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled. However, where the very same information was possessed by defendant's counsel as would have been available were error not committed, it would offend common sense and the fair administration of criminal justice to order a new trial. There is such a thing as harmless error and this was clearly such." 367 U.S. at 371 (emphasis added).

Killian v. United States, 368 U.S. 231 (1961), illustrates both this exception and the more general rule.

17/ See also Ogden v. United States, 323 F.2d 818 (9th Cir. 1963) ("Same material . . . available"; "nothing omitted"); United States v. Kanaher, 317 F.2d 459, 473 (2d Cir.); cert. denied, 375 U.S. 836 (1963) (statement "in full accord"); United States v. Allegrucci, 299 F.2d 811, 814 (3rd Cir. 1962), cert. denied, 372 U.S. 954 (1963) (where comparison of transcript and report, line by line, shows them entirely consistent); United States v. De Sisto, 289 F.2d 833, 834 (2d Cir. 1961) (witness admitted on cross-examination the exact fact for which the defense had requested the statement); Karp v. United States, 277 F.2d 843, 850 (8th Cir.); cert. denied, 364 U.S. 842 (1960) ('testimony . . . differs in no material way").

In argument before the Supreme Court certain documents which were not in the record first came to the attention of the Government. The Solicitor General conceded to the court that these were Jencks Act statements which should have been produced at trial on petitioner's demand. But he represented that "the same information as they contain and much more on the same subjects" had been delivered at trial.[18/] As to these documents, the court remanded to the District Court to make findings:

> "If the District Court finds that the Solicitor General's representations are true in all material respects, it shall enter a new final judgment based upon the record as supplemented by its findings, thereby preserving to petitioner the right to appeal to the Court of Appeals." 368 U.S. at 244.

This was in accordance with the Rosenberg holding on availability of the very same information. But the court then came back to the general rule:

> "If, on the other hand, the District Court finds that the Solicitor General's representations are untrue in any material respect, it shall grant petitioner a new trial." Ibid.

The Court did not condition its order of a new trial upon a finding of the District Court that denial of production

---

18/ 368 U.S. 243 (emphasis added).

of any new or different information contained in the newly discovered documents had worked to the prejudice of petitioner. Implicitly, therefore, denial of information not already in the possession of the defense is always prejudicial.

Furthermore, the most recent interpretations of the statute confirm the obligatory nature of its requirements. In Campbell v. United States, 373 U.S. 487 (1963), cited by this Court in the prior remand of this case, key government witnesses had testified to the identity of three bank robbers and given rather particularized descriptions of their dress. A report had been made by those witnesses to the police shortly after the robbery had taken place, but it had not been produced on the defendant's demand at trial, in violation of the statute. The report showed that the description there given by the witnesses of the robbers' dress differed in certain details from that given in their trial testimony. Accordingly, the Court reversed for new trial without discussion of prejudice.[19/] The opinion merely footnoted the observation:

19/ Accord, United States v. Keig, 320 F.2d 634, 637 (7th Cir. 1963).

> "Understandably, no contention has been made that the refusal to produce the Interview Report can be deemed harmless error under the principles laid down in Rosenberg v. United States, 360 U.S. 367." 373 U.S. at 497 n. 14.

Even before this, the dissenters in Rosenberg, a five to four decision, had carried the day and limited that case to its very special situation. In Clancy v. United States, 365 U.S. 312 (1961), adopted Jencks Act statements had not been produced at trial on demand. The Government's main argument on appeal was that the error was harmless because verbatim copies had been delivered to the defense at trial. But the record did not support that, and the Court declined to try to evaluate the substance of the reports compared to the trial testimony or to other notes and materials which the defense conceded that it did have at the trial. The Court stated:

> "We put to one side Rosenberg v. United States, 360 U.S. 367, where failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." 365 U.S. at 316 (emphasis added).

Accordingly, the Court reversed for a new trial.

Thus the Supreme Court has never allowed a finding of harmless error where there was any difference between a statement and the trial testimony of a witness. In the only case which has squarely presented the problem of an erroneously withheld Jencks Act statement to this Court, this same result was reached. In Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (1960), the defendant was charged with the sale of narcotics. At trial a police officer testified that one transaction took place at 11:45 p.m. Defense counsel sought to impeach him by, inter alia, requesting production of a report by the officer in which he had stated that the alleged transaction occurred at 1:45 p.m. The erroneous withholding of the report was held prejudicial by this Court without discussion.[20/] 108 U.S. App. D.C. at 40-41, 278 F.2d at 874-75.

20/ Cf. Leach v. United States, 115 U.S. App. D.C. 351, 320 F.2d 670 (1963). After direct examination of a government witness, defense moved for production of a statement by the witness. The trial court told counsel to wait and ask for the statement when the policeman who had taken it testified. This court found that requiring the defense to proceed without the statement was error; however, the error was harmless because the defendant was given the statement later in the trial but made no use of it.

Thus neither the Supreme Court nor this Court has ever found harmless the erroneous denial of Jencks Act statements unless the very same impeaching material was already available to the defense. Except in that situation, the Supreme Court has not attempted to evaluate the significance of whatever differences do exist between a Jencks statement and trial testimony or other defense materials. Appellant submits that this is the only proper rule of law. It is required by the rationale and the holding of the original Jencks case. Only this rule comports with the mandatory language of the statute itself.

B. There Are Certain Material Differences of Fact Between the Jencks Statements and the Trial Testimony of Two Key Government Witnesses Which Make the Withholding of the Statements Especially Prejudicial in the Context of This Case.

The trial court in the remand of this case concluded as a matter of law that: "No prejudice resulted to the defendant as a result of not having the statements [of Butler and Smith] at trial (assuming arguendo they were producible)."[21/] There were three subsidiary factual findings upon which this conclusion was supposedly based:

> "24. The witnesses' statements before Mr. Stitely, the Grand Jury, the petit jury, and this Court are not significantly different. Any discrepancies are

21/ Opinion, p. 5.

attributable to the incomplete nature of the statements recorded by Mr. Stitely.

"25. The evidence shows that impeachment of either witnesses Butler's or Smith's credibility at trial could not have been accomplished by the use of the statements (Exhibits #3 and 4)." 22/

Appellant submits that these findings are clearly erroneous; that they are patently incorrect on their face in certain respects; and that the essence of Finding 25 is without support in the record of the remand proceeding or in the record of the trial.

At the remand hearing the Judge was apparently unclear as to the procedure or the purpose of the hearing. 23/ Finally, the Government presented through the testimony of two Assistant United States Attorneys, who were in charge of presenting this case to the Grand Jury, and through the testimony of Mr. Stitely, the Grand Jury clerk, a full description of the procedure by which the statements were

---

22/ Opinion, p. 4. The Court also made a purely conclusory factual finding, corresponding to its conclusion of law: "23. The failure to produce Exhibits 3 and 4 for use of defense counsel during the trial was not prejudicial to defendant." Ibid.

23/ R. Tr. 3-5, 7-10.

taken and the case presented to the Grand Jury. The two witnesses who gave the statements were then permitted to comment on their accuracy. All of these procedures were, of course, perfectly proper for determining whether the statements were Jencks Act statements.

But at no time during the hearing did the Judge compare the text of the statements with the text of the witnesses' testimony before the Grand Jury. Their Grand Jury testimony had not been transcribed and was not before the Judge.[24/] At no time during the remand hearing did the Judge ever make a line-by-line comparison between the text of the statements and the record of the trial testimony. And finally, the witnesses Smith and Butler did not testify at the remand proceeding on the same matters to which they had testified at trial. Thus there is no evidence whatsoever in the record of the remand to support the Court's finding that the "witnesses' statements before Mr. Stitely, the Grand Jury, the petit jury, and this Court are not significantly different." And the statement that "any discrepancies are attributable to the incomplete nature of the statements" is clearly impossible since discrepancies

---

24/ R. Tr. 126-27.

can only arise from the conflicting parts of a statement which has been recorded.[25/] Thus in these respects the findings are patently incorrect.

It is not even relevant that the witness' testimony before the Grand Jury or the remand court might be identical to that in a Jencks Act statement. The only relevant and controlling factor is the existence of differences between the recorded trial testimony and the statements which might have been useful for impeachment purposes. Such comparison can only be properly done on a line-by-line basis. Campbell v. United States, 373 U.S. 487, 496 (1963); United States v. Allegrucci, 299 F.2d 811, 815-17 (2d Cir. 1962), cert. denied, 372 U.S. 954 (1963). United States v. Spangelet, 258 F.2d 338 (2d Cir. 1958) is a salutary example of the error into which the casual procedure followed here has led:

> "In ruling on defendant's request for inspection the trial judge said [the witness'] grand jury testimony was 'a bare outline of' his testimony on trial. This was entirely accurate. But when he went on to say that all of his answers

---

25/ Discrepancies are, of course, not the test in any case. The Jencks rationale, quoted supra at p. 42 makes clear that diversions, contrasts in emphasis, and different orders of treatment are also relevant for testing credibility.

> before the grand jury were consistent with what he has stated here, the Judge, not having, of course, a transcript of the freshly given testimony before him, apparently overlooked the inconsistency . . . as to whether the defendant had read the letter in the hotel room. This we must hold, was error." 258 F.2d at 341-42 (emphasis added).

Thus the procedures by which the findings of the Court could have been made were, in fact, not carried out.[26/] The Judge seemed to rely on his own memory of the testimony in the case. He apparently based his entire conclusion that any error was harmless on his own opinion that the defendant was guilty:

> "THE COURT: Well, I do not think that this is truly a Jencks-type of statement, either one of them. But assume that I'm wrong about that, I am absolutely convinced that there was no prejudice to him as a result of the Court's ruling.
>
> "I remember this case, and I think it would be an absolute miscarriage of justice if he goes unwhipped by justice which, if I grant the relief you seek, would be the case.
>
> "MR. FISHER: Well, Your Honor, we are only asking for a new trial, not an acquittal.
>
> "THE COURT: I know you are. And I'm unwilling to grant it." R. Tr. 88.

26/ The Court adopted verbatim these findings as they were proposed by the prosecution. Such a practice has been disapproved by the Supreme Court in the United States v. El Paso Natural Gas Co., 32 Law Week 4331, 4332-33 and n. 4 (1964).

Hence, these findings are without proper support and clearly erroneous.

If a careful comparison is made between the trial record and the text of the Jencks statements, appellant submits that an ultimate legal conclusion of harmless error cannot be supported. There were material differences of fact between them. An attack on the prosecution witnesses' credibility could have been made by their use. The issue of credibility was crucial. Yet this important impeaching material was erroneously withheld from defense counsel. In such a context the denial was clearly prejudicial.

The trial testimony of the prosecutor's witnesses and that of the appellant and the defense witness as to the actual occurrences in the Starlight Grill on the evening of February 9, 1963, were contradictory on the crucial matter in issue. Appellant testified that he arrived at the bar and restaurant after 7 p.m. (Tr. 202); that he was quite noisy while drinking beer in a booth with friends (Tr. 204); that Butler, the six-foot, three-inch, two hundred fifty pound bartender told appellant to cut out that "noise" and "crap" (Tr. 400, 204); that later when

appellant was again "laughing and talking" at the bar in front of the bartender's cash register, Butler came up with a pistol, pointing it at appellant; that appellant jumped off the stool, beer bottle in hand, and spun out of the way toward the door to the street (Tr. 206); that Butler fired two shots, the second of which hit appellant in the back near the door (Tr. 207); that he had not assaulted Hicklin with the beer bottle, but might have collided with him at the door (Tr. 207-08, 211); but that Hicklin was not even sitting at the bar near appellant at the time. Tr. 211 .

The defense witness, one James Morton, corroborated and amplified this testimony. When Morton came into the bar, Butler and appellant were arguing in "no friendly words." Tr. 283. From a rear booth where he was sitting, Morton heard the first shot and stood up to see what had happened (Tr. 284). He saw appellant run into Hicklin at the door (Tr. 284, 289). Butler then shot appellant in the back (Tr. 284).

The prosecution's version of the occurrence was based on the testimony of Hicklin, the alleged victim of the assault; Butler, the bartender who shot appellant; and

Smith, a waitress employed by Butler. Hicklin testified that he walked through the doorway and along the bar, where he sat down on a bar stool, but then recalled nothing until waking up in the hospital (Tr. 13, 15, 199). He also admitted to testifying at the preliminary hearing that he had been struck immediately upon entering the door (Tr. 32), but then "explained" that he meant he had walked along the bar and sat down first (Tr. 33). Butler testified that appellant entered the bar at 5 p.m. to drink beer (Tr. 39); that between 5 p.m. and shortly before 11 p.m. appellant was in and out of the bar, caused trouble by talking loudly, making noise, and engaging in other rowdy conduct (Tr. 83, 42-3, 44); that he nevertheless always liked appellant (Tr. 82); that Hicklin came into the bar around 11 p.m. and appellant without provocation hit him on the side of the head with a beer bottle (Tr. 45-6); that he warned appellant with a gun and shot into a mirror, as both Hicklin and appellant were on the floor (Tr. 46); that appellant nevertheless picked up a heavy bar stool with one hand and hit Hicklin, and as appellant came up with the stool a second time, he shot appellant (Tr. 46-7, 303-05); that appellant then crawled outside

to the street where he was found by the police and ambulance (Tr. 50). Smith concurred in Butler's version of events up to and including appellant's alleged assault on Hicklin (Tr. 90-98). She also testified that Butler fired a warning shot into the mirror (Tr. 98-9); that when the police arrived, appellant was unconscious and lying on the floor of the bar (Tr. 100).

The crucial concern of the jury in reaching a verdict, then, was to resolve these two corroborated but divergent versions of the facts. It had been the constant effort of defense counsel throughout the trial to attack the credibility of the prosecution witnesses.[27/]

27/ Good headway had been made even without the Butler and Smith statements. A solid basis for interest in the outcome of the litigation, and therefore potential bias in their testimony, had been laid to all of the eyewitnesses to the manner of the alleged assault. Butler was subject to possible criminal prosecution for his conduct (Tr. 221); Elaine Mitchell, another prosecution witness was a "friend" of Butler who regularly sat with him during her frequent visits to the bar (Tr. 173, 274-76); Pauline Smith was an employee (Tr. 143) and a "friend" (Tr. 145) of Butler. The trial judge recognized this in a colloquy at the bench relating to the propriety of examination of Mrs. Mitchell as to the alleged illicit relationship with Butler:

> [THE COURT]
>
> "Now, if these people are being brought in to perjure themselves just to keep Butler from being charged with this offense or, as

In his final summary and argument to the jury, defense counsel stressed the credibility of the appellant's version:

> "That is a more reasonable interpretation, I would submit to you, for the injury that he had than being stabbed repeatedly with the broken edge of a beer bottle in the face and being crunched with a bar stool the size of which you saw here yesterday." Tr. 414-15.

The matter was then squarely put to the jury:

> "This means, ladies and gentlemen, that there is false testimony in this case. You cannot avoid the issue. You have to face up to it and judge the credibility.

(footnote continued)

> you earlier argued, Mr. Price, to protect him for an assault, just putting the fix on the defendant, then she would have an interest in the case and a bias and a prejudice in favor of Butler.
>
> * * *
>
> "And therefore counsel would be entitled to impeach her testimony if he could, in order to show such bias and prejudice as a possible reason for her testimony.
>
> * * *
>
> "It may show a bias in favor of Butler to the extent of protecting him and putting the blame for Hicklin's condition on Williams." (Tr. 221-23.)

Birth certificates of two children of Mrs. Mitchell, in which the father's name, alone, was left out, were ultimately described to the jury by the Court for their consideration, although not admitted into evidence. (Tr. 364.)

> "Are these people telling the truth? Is Mr. Butler telling the truth? Is Mrs. Mitchell telling the truth? Mrs. Smith? Are they?
>
> "You have to evaluate their credibility to decide for yourself." Tr. 406-07.

In a case which was submitted to the jury in this posture, it is clear that each and every support for the defense's attack on the prosecution witness' credibility was vitally important.

Specific examples of the Butler and Smith trial testimony, which contradicted their prior statements to the Grand Jury clerk and which could therefore have been used for such impeachment, are: (1) Butler testified that appellant came into the bar "around 5:00 p.m.";[28/] Butler had stated that appellant had come in "starting around 7:00 p.m."[29/] (2) Butler testified that he held no grudge against appellant, but rather, "I have always liked him, every one of them."[30/] Butler had stated that appellant was ". . . a member of a gang that buys whiskey outside and drinks same in the streets and alleys and then comes

---

28/ Tr. 39.

29/ GX 3.

30/ Tr. 82.

into the Grill and starts trouble . . .."[31] (3) Butler testified that appellant had hit Hicklin "only once" with the bar stool (Tr. 70). Butler had stated that appellant had gone "back again and hit Hicklin, who was down on the floor, with the bar stool a second time . . .." (GX 3.) (4) Smith also testified at trial that appellant hit Hicklin once with the bar stool (Tr. 136). But she too had stated, ". . . Williams hit Hicklin a second time . . .." (GX 4.) The fact that both Butler and Smith had made the same change in their version of what happened would have had the additional effect before the jury of linking the two together as potentially biased.[32] (5) Smith testified that appellant was lying on the floor unconscious when the police arrived (Tr. 100). Smith had stated, "Williams was crawling out the door after being shot . . .." (GX 4.) This was particularly significant in view of appellant's testimony that he had hit Hicklin, if at all, only in trying to get out the door.

These literal discrepancies clearly bring the statements to Mr. Stitely within the rule that a new trial

---

31/ GX 3. This economic threat to Butler's living is clearly another separate basis of a possible grudge against appellant, in addition to the fact that he had arguments with appellant in the past. See Tr. 82-3.

32/ See supra, n. 27 at p. 58.

is required unless the very same impeaching material was available to the defense. Moreover, it is impossible to assay in retrospect all the ways in which the prior statements would actually have served their purpose of impeachment and lessening of credibility at the trial. The impact of differences of emphasis, or inconsistencies on collateral matters, is a subtle and psychological matter and highly dependent on human demeanor and response in the jousting of direct and cross-examination. The rationale of the original Jencks decision, quoted above,[33/] must be kept clearly in mind, when noticing only the literal inconsistencies between the statements and the trial testimony.

Under these circumstances appellant submits that the statements of Butler and Smith would have provided important ammunition for this attack, and their denial was therefore prejudicial error. "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the [error]

33/ p. 42. And see Rosenberg v. United States, 360 U.S. 367, 376: ". . .[A]ppellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement." (dissenting opinion by Brennan, J.).

complained of. The question is whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction."[34] Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963).

Thus appellant submits that the use which could have been made of these statements in the context of the credibility issues before the jury excludes them from the Rosenberg class of statements, even where that class has been loosely interpreted by other lower courts.[35] But we urge this Court to refrain from applying those loose interpretations in this circuit. For it then becomes inevitable that eventually this Court would find itself in the position of Judge Clark in United States v. Cardillo, 316 F.2d 606, 616-17 (2d Cir.) cert. denied, 375 U.S. 822 (1963):

34/ Fahy involved erroneous introduction of certain evidence, rather than erroneous withholding of certain evidence as here. Hence the word in brackets in the court's opinion was "evidence" rather than "error".

35/ See, e.g., Hance v. United States, 299 F.2d 389 (8th Cir. 1962) (substantially the same information); United States v. Aviles, 200 F. Supp. 711 (S.D.N.Y. 1961), appeal pending per Evola v. United States, 375 U.S. 32 (1963) (not prejudicial because same and better impeachment material had been given to defense counsel).

> "We seem generally unwilling to upset convictions when the Jencks Act, 18 U.S.C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in United States v. Annunziato, 2 Cir., 293 F.2d 373, 382, cert. denied Annunziato v. United States, 368 U.S. 919 . . ., that it is only 'harmless error' not to produce a statement which appears to 'corroborate' a witness's testimony, or in United States v. Simmons, 2 Cir., 281 F.2d 354, 357-358, and the present case that the defense is not entitled to statements relating to purely incidental or collateral aspects of a witness's testimony, or in United States v. Aviles, 2 Cir., 313 F.2d 186, that the defense is not entitled to statements not sufficiently exact, though to the district judge 'probably verbatim,' recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See Scales v. United States, 367 U.S. 203, 258 . . .; Palermo v. United States, 360 U.S. 343, 346 . . .; Jencks v. United States, 353 U.S. 657, 668-69 . . .. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted."

Appellant submits that correction has come from the Supreme Court. Campbell v. United States, 373 U.S. 487, 497 n. 14 (1963); Killian v. United States, 368 U.S. 231, 244 (1961); Clancy v. United States, 365 U.S. 312, 316 (1961). This

Court has always required a new trial where a Jencks Act statement has been erroneously withheld. Howard v. United States, 108 U.S. App. D.C. 38, 278 F.2d 872 (D.C. Cir. 1960). It is especially clear that the Court should continue to do so in the context of this case.

III. CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

/s/ Vance A. Fisher
VANCE A. FISHER

/s/ John B. Denniston
JOHN B. DENNISTON

701 Union Trust Building
Washington 5, D. C.

Attorneys for Appellant
(Appointed by This Court)

Of Counsel:

GEORGE BLOW
Barco, Cook and Patton
1717 Pennsylvania Avenue, N.W.
Washington, D. C.

Dated: May 1, 1964

REPLY BRIEF FOR APPELLANT

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v. No. 18,462

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VANCE A. FISHER
JOHN B. DENNISTON
701 Union Trust Building
Washington 5, D. C.

Attorneys for Appellant
(Appointed by This Court)

Of Counsel:

GEORGE BLOW
Barco, Cook and Patton
1717 Pennsylvania Avenue, N. W.
Washington, D. C.

Date: June 8, 1964

REPLY BRIEF FOR APPELLANT

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

ISAAC WILLIAMS,
APPELLANT,

v. No. 18,462

UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

TABLE OF CITATIONS

ARGUMENT

I. THERE IS NO EVIDENCE OF CHANGE OR SELECTION IN THE TRANSCRIPTION OF THE STATEMENTS 1/

The evidence is clear that Mr. Stitely transcribed at least the substance of the witnesses Smith and Butler's testimony in at least substantially their own words. Appellee however urges that Mr. Stitely transcribed merely his "version" of the witnesses' statements. But Mr. Stitely explained on examination by counsel for appellee that by this he meant simply that he used the third person rather than the first person. (R. Tr. 48-9, 2/ and see Appellant's Brief at p. 32, n. 9.) Appellee also urges that Mr. Stitely endeavored to take down only the "highlights", "essentials" or "heart" of the witnesses' testimony. However, Mr. Stitely explained that by those phrases he meant he recorded the substance of the witnesses' testimony (R. Tr. 59, 77), which is all the statute requires. Campbell v. United States, 373 U.S. 487, 489 (1963).

1/ Appellant does not concede, as appellee suggests, that the statements were not producible under Subsection (e)(1) of the Jencks Act as adopted statements. It is clear that at least a portion of Butler's statement was adopted by him during its transcription. See appellant's main brief, p. 29, n. 6. Moreover, Butler and Smith each adopted their

Appellee further urges that Mr. Stitely was selective in taking the statements, citing Palermo v. United States, 360 U.S. 343, 352 (1959). In that case the Supreme Court stated that deliberate selection of material raises the danger of distortion inherent in quotations out of context. The Court there was concerned, however, with "evidence" of "substantial selection of material."

In this case, there is no evidence of selection by Mr. Stitely of portions of the witnesses' statements. The possibility of selection is negatived by the record facts, moreover. First, there was no testimony of a time lapse between the taking of the statements and their transcription. On the contrary, both witnesses Smith and Butler testified that Mr. Stitely was typing while they were talking. (R. Tr. 97-8, 113.) There thus was no time for the selection process which appellee urges took place. Second, such selectivity is negatived by the detail in which the statements were actually taken, with precise transcription of the witnesses' every obscene expression or error in

---

(Footnote cont'd)
entire statements at the hearing on remand See Appellant's Brief, p. 33, n. 10.

2/ Tr. of hearing on remand, January 24. 1964.

grammar. (R. Tr. 57-8, 99, 108-09. GX 3-4, F 16. See also Appellant's Brief at pp. 33-4, nn. 11-12.) Third, the possibility of selectivity by Mr. Stitely is further negatived by the very high ratio of the number of words in the statements to the length of the interviews with the witnesses. Cf. Palermo v. United States, 360 U.S. at 355, n. 12. Accordingly, appellee's contention is without support in the record.

II. APPELLEE HAS ADVANCED INCORRECT ASSERTIONS AND IMPROPER STANDARDS IN TESTING THE CORRECTNESS OF THE DISTRICT COURT'S LEGAL CONCLUSION THAT DEFENDANT SUFFERED NO PREJUDICE BY THE WITHHOLDING AT TRIAL OF THE JENCKS ACT STATEMENTS

Appellant has fully argued the two points that withholding a Jencks Act statement does not constitute harmless error when there is any difference between the statement and the trial testimony of a witness (Appellant's Brief, p. 42); and that there are material differences of fact between the statements and the trial testimony of two key Government witnesses which make the withholding of the statements especially prejudicial in the context of this case (Appellant's Brief, p. 50). Appellee's assertions that

no material variance was shown, that the statements were "valueless" for impeachment purposes, and that "nothing new" would have come out of cross-examination had the statements been produced, are conclusory and are without support in the record. The witnesses' remand testimony that any differences were the mistake of the typist was clearly self-serving. These rationalizations must fall before the factual context of the trial and the authorities already cited by appellant.

Appellee also asserts that because of the trial judge's recollection of the weight of the evidence and testimony, he was in the best position to determine whether withholding the statements was prejudicial. But the weight of the prosecution's evidence, absent observance of the defense's right to impeaching statements within the Jencks Act, is not determinative or even relevant. Rather the controlling factor is whether the Jencks material contains statements of impeaching value. If it does, their withholding is prejudicial. Appellee can hardly deny that the results of defense attempts to impeach its witnesses were crucial to the verdict in view of the closing argument of the prosecution:

"Now, counsel has spent a great deal of time in this case attempting to impeach the Government witnesses with prior statements. Now, the Government has tendered statements to the defense, the police officer's statement of facts, statement of facts taken by other officers, and we have checked to determine if there are any other officers that had notes and none had any.

"Now, ladies and gentlemen of the jury, he was given all of that. And he thoroughly, minutely cross-examined the Government's witnesses with this to a great extent. And was he able to shake those witnesses on any really material point? Sure, there might have been a discrepancy as to the exact location or exact time or who was standing where, but they all corroborated the fact that Hicklin was hit while he was seated at the bar, that he was knocked to the floor across from the cash register, that there were fragments of glass on the floor, and that the bar stool was turned over.

"Now, ladies and gentlemen of the jury, in effect, what he has done by this quest and this investigation into prior statements, he has corroborated the Government's case because now you know that these witnesses have not said this for the first time during this trial. They have stated or they have told this same version many times before to the police officers. You heard even the defendant say that Butler and Hicklin testified at the preliminary hearing quite awhile ago. And I ask you ladies and gentlemen of the jury, was he able to show any material discrepancies in the testimony of these witnesses by these prior statements? I venture to say that there were no discrepancies. You heard the testimony. You can be the judges of that." (Tr. 392-93.)

With impeachment so emphatically in issue, denial of impeaching material was clearly prejudicial.

Finally, appellee has stated in its Summary of Argument that "the findings of the District Court are supported by the record and should not be disturbed on appeal unless clearly erroneous." This is of course the correct standard for findings of fact. The trial judge's pure findings of fact are not, however, challenged by appellant. Insofar as they relate to the factual setting in which the Jencks statements were made, appellant relies on the findings, as amplified by the record on which they are based. Appellant does challenge the legal conclusion which the trial judge has made on the basis of these factual findings. Where the judge has incorrectly applied the applicable law in arriving at his legal conclusions, no special "clearly erroneous" burden of proof must be met. Appellant submits that the required showing of error has been demonstrably made here.[3/]

3/ For recent secondary authority making the argument, as has appellant, that the Second Circuit's harmless error doctrine has subverted the Jencks principle and incorrectly interpreted the Jencks Act, see The Jencks Right: Judicial and Legislative Modifications, the States and the Future, 50 Va. L.R. 535, 541-543 (1964).

III. CONCLUSION

Appellant submits that the judgment of conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

/s/ Vance A. Fisher
VANCE A. FISHER

/s/ John B Denniston
JOHN B. DENNISTON

701 Union Trust Building
Washington 5, D. C.

Attorneys for Appellant
(Appointed by This Court)

Of Counsel:

GEORGE BLOW
Barco, Cook and Patton
1717 Pennsylvania Avenue, N.W.
Washington, D. C.

Dated: June 8, 1964

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,462

ISAAC WILLIAMS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
B. MICHAEL RAUH,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1) Whether the District Court properly concluded that the statements of witnesses Butler and Smith recorded by the Grand Jury clerk, Mr. Stitely, were not subject to production under the Jencks Act.

2) Whether the District Court properly concluded that no prejudice resulted to appellant as a result of not having the statements at trial, assuming *arguendo* that they were producible.

INDEX

TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

Cases—Continued

• Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,462

ISAAC WILLIAMS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged by indictment filed on April 5, 1963, with violation of 22 D.C. Code 502 (assault with a dangerous weapon) (J.A.[1] 4). Upon a plea of not guilty (J.A. 5), and trial by jury, a verdict of guilty as indicted was entered (J.A. 6). By judgment and commitment filed June 18, 1963, appellant was sentenced to imprisonment for a period of two to six years (J.A. 9).

---

[1] J.A. references are to the joint appendix in the direct appeal from appellant's conviction, Appeal No. 17,964.

The Trial

The evidence adduced at trial shows that appellant, without provocation, assaulted Charles Hicklin with a beer bottle and bar stool at the Starlight Grill, located at 436 L. Street, Northwest, Washington, D. C. about 11:00 p.m. on February 9, 1963. Mr. Hicklin testified that he entered the grill around 10:55 p.m., looked around, sat on a stool at the bar, was struck across the head with a bottle (Tr.[2] 15, 36, 199) and "that is the last thing I remember" (Tr. 13). The next thing Hicklin recalled was being at the Washington Hospital Center with a stab wound over the left temple which required stitching (Tr. 15).

The manager and bartender of the Starlight Grill, Roy Thomas Butler, testified that appellant first came in the bar around five o'clock on the evening of February 9, 1963, and that periodically he would leave and return (Tr. 39, 41). During the evening appellant went back into the kitchen where he annoyed the waitress (Tr. 42, 94), poured a glass of beer on the floor, broke a bottle on the floor, cursed the waitress (Tr. 45, 93, 95), acted in a boisterous manner (Tr. 83, 86, 154) and struck a female patron (Tr. 44, 86, 95). Because of his unruly conduct appellant was asked to leave the restaurant (Tr. 43, 83, 86, 154). Close to eleven o'clock Mr. Hicklin entered the Grill and took a seat at the bar (Tr. 45, 63). Whereupon, appellant picked up a bottle of beer from a table across the room (Tr. 64) and struck Hicklin on the left side of the head, knocking him off the stool (Tr. 45, 46, 65). Appellant then, picked up a heavy metal bar stool (Tr. 69, 70) and smashed the unconscious victim in the face. Butler thereupon fired a warning shot with a pistol he kept under the cash register. (Tr. 46, 72.) As appellant was about to render another blow with the bar stool, Butler shot Williams in the side to prevent further injury to the complainant (Tr. 47, 70). A waitress, at the request of Butler, called the police, who arrived shortly thereafter and found the bloody complainant, in a

---

[2] Tr. references are to the trial transcript in Criminal Case No. 317-63.

semiconscious state, on the floor of the Grill and appellant lying on the sidewalk (Tr. 50, 182, 187, 356). Mrs. Pauline Smith, a waitress in the Grill (Tr. 90) and Miss Elaine Mitchell, a patron (Tr. 151) corroborated Butler's testimony (Tr. 97-101, 155-157).

Appellant testified that he was in the bar on the night in question, wasting time by having a few drinks with some friends (Tr. 202, 212, 237). He denied disturbing the waitress or striking the lady customer (Tr. 202, 204). He stated that he was sitting at the bar when Butler went behind the counter and "he came up with his pistol. I looked at him momentarily * * * and he pointed the pistol, and I jumped off the stool at the time I saw the pistol. When I jumped off the stool, I spun around; and about that time Mr. Butler fired a shot. I don't know who he was firing at * * *. About this time I was going down the aisle. Then he fired the second shot, and he shot me in the back or in the side * * *. I was by the door because I was moving out of his way, out of the path of fire * * *. I had the bottle of beer in my hand * * *. I don't remember striking Mr. Hicklin at all. The only way I could strike Mr. Hicklin was to collide with him at the time I was moving out of Mr. Butler's path of fire. I don't remember striking him at all." (Tr. 206-208.)

James Morton, a frequent patron in the Grill (Tr. 273), and Edward Howard, appellant's brother-in-law, attempted, by their testimony, to substantiate appellant's version of the events (Tr. 282-4, 290-296). Dr. Robert Smith, the attending physician in the emergency room of the Washington Hospital Center, testified from the hospital records that he treated Mr. Hicklin on February 9, 1963, for a laceration to the left temple which required stitching (Tr. 323-6).

The Hearing

Pursuant to this Court's opinion in *Isaac Williams* v. *United States*, —— U.S. App. D.C. ——, 328 F.2d 178 (1963), a hearing was held by the District Court on January 24, 1964. Findings of Fact and Conclusions of Laws

were entered, and appear as an appendix to this brief. The original judgment of conviction remained and appellant comes to this Court, challenging the District Court's ruling that the statements of witnesses Butler and Smith, recorded by Mr. Stitely, were not producible under the Jencks Act[3] and even if they were, no prejudice resulted to appellant, as a result of not having the statements at trial. See, *Williams* v. *United States, supra,* at 181.

Donald S. Smith, the Assistant United States Attorney in charge of the Grand Jury (Hr. Tr.[4] 17), testified as to the procedure followed by a witness in testifying before the Grand Jury. Immediately following the committing magistrate's determination of probable cause to hold an accused for action of the Grand Jury, the officer in charge of the case will go to Mr. Smith's office to discuss the investigation, and a date will be set for the presentation. Subpoenas will thereupon be issued for the witnesses to appear in room 3812 of the United States Courthouse (Hr. Tr. 22) at 9:00 a.m. on the designated date. (Hr. Tr. 19, 20.) When all witnesses in the case are present, they will go before one of three administrative clerks, who will take statements (Government Exhibit No. 1) from them (Hr. Tr. 20). A case jacket (Government Exhibit No. 5) is made, the statements are inserted and the officer takes the jacket (as well as the witness) to the Grand Jury room where he gives the jacket to the Deputy United States Marshal, who in turn will give it to the Assistant United States Attorney presenting the particular case (Hr. Tr. 20, 22, 23). The witnesses wait in a designated room until called to testify (Hr. Tr. 22-23). The statements taken by the clerks are used by the prosecutor in presenting an orderly case to the Grand Jury (Hr. Tr. 23, 24). As a rule the witnesses never see these statements (Hr. Tr. 25). Upon completion of the witnesses' testimony before the Grand Jury, he is given a "witness slip", which form the witness presents to the

---

[3] 18 U.S.C. § 3500, 71 Stat. 595 (1957).

[4] Hr. Tr. refers to the transcript of the hearing on the remand held January 24, 1964.

United States Marshal's office, and upon signing the back will be sent remuneration for his appearance (Hr. Tr. 25, 26, Government Exhibit No. 2).

Wilmer Stitely, Chief Clerk in the Grand Jury section of the United States Attorney's office, took the statements of witnesses Butler and Smith (Hr. Tr. 13, 14, 28). As a general rule, Mr. Stitely, interviewing ten witnesses a morning (Hr. Tr. 52), records "just the highlights" (Hr. Tr. 14), "essentials" (Hr. Tr. 53, 55, 62) or "the heart of their testimony" (Hr. Tr. 55) according to his version of what the witnesses tell him (Hr. Tr. 15, 55, 60), in Mr. Stitely's own words (Hr. Tr. 57). The witnesses in the case will be called into Mr. Stitely's office altogether, but he will take their statements individually beginning with the complaint and eyewitnesses (Hr. Tr. 35, 36). Depending on the length of the statement, Mr. Stitely will hear the complete story and then write his version, or he may stop the witness part way through (Hr. Tr. 36, 66-7). As a general rule the statements are not read to, seen, nor signed by the witness (Hr. Tr. 37). The statements are taken for the purpose of guiding the Assistant United States Attorney in presenting the case to the Grand Jury and to the indictment writer in her drafting of the indictment after the jury's vote (Hr. Tr. 46, 47).

Mr. Stitely could identify the statements of witnesses Butler and Smith (Government Exhibits Nos. 3 and 4) by the appearance of his initials "ws" (Hr. Tr. 39). The handwritten notations, "Dangerous man" and "and Bar Stool" were in Mr. Stitely's handwriting (Hr. Tr. 44). Mr. Stitely could not recall whether he questioned Butler and Smith fully or in part before typing the statement (Hr. Tr. 40, 42). Mr. Stitely testified that the statements he took from Butler and Smith were not substantially verbaim, but was his "version of what they said" (Hr. Tr. 48, 122). The punctuation and grammatical errors, were Mr. Stitely's as a typist and not the words of the witnesses (Hr. Tr. 74, 75).

Roy Thomas Butler, the bartender at the Starlight Grill and eyewitness to the assault, testified that he remembered

talking with Mr. Stitely before his Grand Jury appearance (Hr. Tr. 96, 97). Butler recalled that Mr. Stitely was typing during their conversation, but that the statement was never shown to, nor signed by him (Hr. Tr. 97, 98). Butler repeated his eyewitness account of the crucial part of the assault, consistent with his trial testimony, stating that this was what he told Mr. Stitely, and any variance was Mr. Stitely's error (Hr. Tr. 99, 100).

Pauline Smith, a waitress in the Grill and another eyewitness to the assault, also recalled giving a statement to Mr. Stitely prior to testifying before the Grand Jury (Hr. Tr. 112, 113). She testified that Mr. Stitely typed part of the statement before she finished talking, but that he did not read it back, show it to her, nor did she sign it (Hr. Tr. 113, 114). Mrs. Smith testified that the statement was not exactly correct, for she told Mr. Stitely that Butler fired the first shot into the mirror and the second as appellant was about to strike Hicklin for the second time (Hr. Tr. 115, 116).

Robert X. Perry, Assistant United States Attorney, presented the instant case to the Grand Jury (Hr. Tr. 117, 118, 119, Government Exhibit No. 5). Mr. Perry, testified that he made the remaining handwritten notations (Hr. Tr. 119, 120). At the conclusion of all the testimony and argument, the District Court denied appellant a new trial (Hr. Tr. 130).

STATUTE INVOLVED

Title 18, United States Code, Section 3500, provides:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has

testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall

strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

SUMMARY OF ARGUMENT

Appellant's only contention on this appeal is that the statements taken by Mr. Stitely, a government clerk, of witnesses Butler and Smith were producible under 18 U.S.C. 3500(e)(2) and failure to so produce was prejudicial. The trial court, upon remand, held a plenary hearing and found the statements not to be substantially verbatim accounts, hence not producible. Further, even if they were subject to production at trial, a new trial is not required for appellant has not suffered any prejudice as a result of not having the statements. The findings of the District Court are supported by the record and should not be disturbed on appeal unless clearly erroneous.

ARGUMENT

I. The District Court properly concluded that the statements of witnesses Butler and Smith taken by clerk Stitely were not producible pursuant to the Jencks Act.

(See Hr. Tr. 14, 15, 48, 55, 57, 60, 97-8, 113, 122)

Appellant does not claim[5] producibility of the "statements" as "a written statement made by said witness and signed or otherwise adopted or approved by him" but rather as a "recording * * * which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously * * *." 18 U.S.C. 3500 (e)(1) and (2). Although the Government agrees that the statements were "contemporaneously recorded" by a Government agent, it by no means concedes that Mr. Stitely transcribed the statements, as the witnesses spoke the words, in a substantially verbatim manner. Quite the contrary, the record shows that as a general rule, Mr. Stitely would wait until the witness had completed at least part of his narration before transcribing his (Stitely's) version of the statement. *Johnson* v. *United States,* 269 F.2d 72, 74 (10th Cir. 1959). In the instant case it appears that Mr. Stitely heard part of the lengthy oral statements, typed part of his statement and then heard the remainder before completing his rather brief statement (Hr. Tr. 97-8, 113).

The District Court, upon the remand, held an exhaustive hearing into the producibility of the questioned statements. Upon hearing all the testimony and argument, the District Court concluded that the statements did not fall wihin the definition of the Jencks Act, 18 U.S.C. 3500(e) (1) and (2). This determination is supported by the record and the law.

In order that such recordings be producible, they should

---

[5] Appellant, at the hearing, conceded that the statements were not signed by the witnesses and from the testimony it is clear that the statements were not otherwise adopted or approved by them (Hr. Tr. 27, 98, 113-114).

be made with "a very high degree of exactness." *Campbell* v. *United States,* 296 F.2d 527, 532 (1st Cir. 1961), *rev'd on other grounds,* 365 U.S. 85. Such statements must be more than "summaries" or "notes" in order that they shall be producible. *Borges* v. *United States,* 106 U.S. App. D.C. 139, 270 F.2d 332 (1959), *cert. denied,* 361 U.S. 471; *McGill* v. *United States,* 106 U.S. App. D.C. 136, 270 F.2d 329 (1959), *cert. denied,* 362 U.S. 905. Some of the factors to be considered in determining whether the statement is "substantially verbatim" are: (1) the extent to which it conforms to the language of the witness, *United States* v. *Stromberg,* 268 F.2d 256, 273 (2nd Cir. 1959); *United States* v. *Waldman,* 159 F. Supp. 747, 749 (D.C.N.J. 1958), (2) the length of the report in comparison to the length of the interview, *Palermo* v. *United States,* 360 U.S. 343, 355 f.n. 12 (1959), (3) the lapse of time between the interview and its transcription, *Palermo* v. *United States, supra,* at 352-3, (4) the appearance of the substance of the interviewee's remarks, *United States* v. *McKeever,* 271 F.2d 669, 674 (2nd Cir. 1959); *United States* v. *Waldman, supra; United States* v. *Papworth,* 156 F. Supp. 842, 853 (D.C.N.Tex. 1957), *aff'd,* 256 F.2d 125 (5th Cir. 1958), *cert. denied,* 358 U.S. 854, (5) the use of quotation marks, *McKeever* v. *United States, supra,* and (6) the presence of the comments or ideas of the interviewer, *United States* v. *McKeever, supra; United States* v. *Waldman, supra.*

A comparison of these criterion to the record in the instant case supports the District Court's determination of non-producibility: (1) Mr. Stitely testified that the language was not that of the witnesses, but rather were his own words, recorded after having heard the witnesses story (Hr. Tr. 14, 15, 48, 55, 57, 60, 122), (2) the record does not indicate precisely how long Mr. Stitely talked with witness Butler or Smith, nor do we know how many witnesses Mr. Stitely saw that day or in fact how long is Mr. Stitely's "morning", but we do know from the length of the statements that they are not excessive and could be typed in a

relatively short space of time, (3) the lapse of time between interview and recording was brief, but long enough so that the words used were those of the typist writing his abbreviated version of what he had just heard, (4) the statements here were merely the "highlights", "essentials", or "heart of their testimony" and did not purport to be the substance of the witnesses' statement (Hr. Tr. 14, 15, 53, 55, 57, 60, 62), (5) quotation marks were used only once, and then to set off the words of another person as heard by the witness (Hr. Tr. 49-50), and (6) the ideas of Mr. Stitely appear from the selection of facts, based on his knowledge of what is needed by the Assistant United States Attorneys who will use these statements in the future (Hr. Tr. 46).

The Jencks Act was passed to limit the impact of the Supreme Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), yet preserve the rights of an accused to cross-examine a witness with prior statements that he made, where accurately preserved. In order that this right to cross-examine the witness be fair, the writing used for that purpose should be a "fairly comprehensive reproduction of the witness' words * * *." *United States* v. *Thomas*, 282 F. 2d 191, 194 (2nd Cir. 1960). In *Palermo* the Supreme Court in interpreting the Jencks Act stated:

> It is clear from the continuous congressional emphasis on 'substantially verbatim recital,' * * * that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, * * * are not to be produced. *Palermo* v. *United States*, 360 U.S. 343, 352 (1959).

The testimony adduced at the hearing indicates that Mr. Stitely did not take a full statement, but rather only the highlights, essentials or heart so the Assistant United States Attorney could present an orderly case to the Grand Jury, so the indictment writer had the necessary pertinent data and so the Assistant United States Attorney assigned to try the case had some pre-trial knowledge of the crime charged. The issues before the District Court for determination of producibility are properly ones of fact which must be weighed by the trier in its sound judicial determination. The record clearly supports the District Court's findings that the writings were not producible under the Jencks Act, which findings on appeal "may not be disturbed unless clearly erroneous." *Campbell* v. *United States,* 373 U.S. 487, 493 (1963); *Palermo* v. *United States,* 360 U.S. 343, 353 (1959); *Alexander & Watkins* v. *United States,* Nos. 18124-5, decided April 16, 1964; *Saunders* v. *United States,* 116 U.S. App. D.C. 326, 323 F.2d 628 (1963); *United States* v. *Cardillo,* 316 F.2d 606, 616 (2nd Cir. 1963), *cert. denied,* 375 U.S. 822; *Hance* v. *United States,* 299 F.2d 389, 397 (8th Cir. 1962).

II. The District Court properly concluded that no prejudice resulted to appellant from his failure to have the statements, assuming *arguendo* that they were producible.

(See Hr. Tr. 98-100, 115-116)

The law is now well settled in this jurisdiction[6] that a new trial is not required for the failure to produce statements properly demanded under the Jencks Act, unless the failure to so produce the statements was prejudicial to appellant. *Moore* v. *United States,* —— U.S. App. D.C. ——, 328 F.2d 555 (1964); *Isaac Williams* v. *United States,* —— U.S. App. D.C. ——, 328 F.2d 178, 181 (1963); *Hilliard* v. *United States,* 115 U.S. App. D.C. 86, 317 F.2d 150 (1963);

---

[6] *Howard* v. *United States,* 108 U.S. App. D.C. 38, 278 F.2d 872 (1960), is not to the contrary, for the Government, in its brief, conceded the statements were producible and failure to do so was prejudicial error. The Government only contended, in that case, that no proper demand for the statements had been made.

Saunders v. *United States,* 114 U.S. App. D.C. 345, 316 F.2d 346 (1963). These cases are based on the Supreme Court's decision in *Rosenberg* v. *United States,* 360 U.S. 367 (1959), holding that the failure to produce certain documents under 18 U.S.C. 3500 was "harmless error" where the same information was possessed by appellant's counsel. Cf. *Killian* v. *United States,* 368 U.S. 231, 244 (1961). This certainly is not the only factual situation giving rise to harmless error for the Circuit Courts have found lack of prejudice in numerous cases. *Leach* v. *United States,* 115 U.S. App. D.C. 351, 320 F.2d 670 (1963) [failure to produce statement at proper time, became harmless error, for when produced it was not pursued]; *United States* v. *Keig,* 320 F.2d 634 (7th Cir. 1963) [cites approvingly from *Killian* v. *United States, supra.*]; *Ogden v. United States,* 323 F.2d 818 (9th Cir. 1963) [failure to produce destroyed notes was not prejudicial where the same material was made available in another statement]; *United States* v. *Kanaher,* 317 F.2d 459 (2nd Cir. 1963), *cert. denied,* 375 U.S. 836 [failure to produce requested statement became harmless error where the statement was "in full accord" with the testimony given]; *United States* v. *Allegrucci,* 299 F.2d 811 (3rd Cir. 1962), *cert. denied,* 372 U.S. 954 [harmless error where testimony was nearly identical to unproduced statement]; *United States* v. *Annunziato,* 293 F.2d 373, 382 (2nd Cir. 1961); *cert. denied,* 368 U.S. 919 [harmless error where unproduced statement and witness' testimony "checks fully"]; *United States* v. *DeSisto,* 289 F.2d 833 (2nd Cir. 1961) [failure to produce statement was not prejudicial where same questions were asked on cross-examination]; *Karp* v. *United States,* 277 F.2d 843, 849 (8th Cir. 1960), *cert. denied,* 364 U.S. 842 [failure to produce statement was not prejudicial unless "material variance" was shown].

In the instant case, appellant has been unable to show any material variance between the typed statements and the trial testimony of witnesses Butler and Smith. *United States* v. *Kanaher, supra; United States* v. *Allegrucci, supra; United States* v. *Annunziato, supra; Karp* v. *United*

States, supra. In fact the only inconsistency at all to which he points was clarified by the witnesses' testimony at the hearing, stating that the difference was the mistake of the typist (Hr. Tr. 98-100, 115-116, 122). Thus it is quite clear from the record that the statement would have been valueless to appellant for impeachment purposes. Granted, we cannot speculate on what use appellant could have made with the statements, but that need not concern us, for having seen the statements he is unable to show any possible impeaching value. Trial cross-examination of the witnesses was extensive and all areas of the assault and shooting were thoroughly explored. Nothing new would have been open for inquiry had the statements been produced. *United States* v. *De Sisto, supra.* The District Court recalled the trial, the evidence, and the witnesses' testimony (Hr. Tr. 88). He was in the best position to evaluate the effect of the statements and whether prejudice existed. It was his determination that none existed and as such conclusion is amply supported by the record it should not be disturbed on appeal. *Campbell* v. *United States, supra.*

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
B. MICHAEL RAUH,
Assistant United States Attorneys.

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal Case No. 317-63

UNITED STATES OF AMERICA,

v.

ISAAC WILLIAMS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on a remand from the Court of Appeals for the District of Columbia Circuit for further proceedings consistent with their opinion (*Williams* v. *United States,* No. 17,964, decided December 12, 1963), evidence, testimony and argument by counsel having been adduced in open court, the Court makes the following Findings of Fact:

1. The defendant was convicted by a jury of assault with a dangerous weapon (22 D.C. Code 502) and sentenced to imprisonment for a period of two to six years. From that judgment he appealed.

2. The Circuit Court of Appeals remanded the cause for a hearing to determine whether the statements of Roy Thomas Butler and Mrs. Pauline Smith, transcribed by the Grand Jury Clerk should have been produced at trial in accordance with the Jencks Act, 18 U.S.C. 3500, and if so whether failure to so produce was prejudicial to the defendant.

3. A full hearing was held on Friday, January 24, 1964, at which the defendant was present in open court and represented by three able court-appointed counsel. Five witnesses appeared and testified in the following order: (1) Mr. Donald S. Smith, Assistant United States Attorney, (2) Mr. Wilmer R. Stitely, Chief Clerk in the Grand Jury Division of the United States Attorney's Office, (3) Mr. Roy Thomas Butler, (4) Mrs. Pauline Smith, and (5) Mr. Robert X. Perry, Assistant United States Attorney.

4. Five documents were introduced and admitted into evidence as exhibits: (1) a blank Grand Jury Statement form No. USA-9x-65, (2) a blank Witness Attendance Certificate form No. USA-798, (3) the statement of Roy Thomas Butler (4) the statement of Pauline Smith, and (5) the Government's trial folder.

5. When a case is scheduled for presentation to the Grand Jury, all witnesses are ordered to report beforehand to the office of the United States Attorney, Grand Jury Division.

6. There, their statement is taken by the Chief Clerk of the Grand Jury, Mr. Wilmar R. Stitely, or by one of his two assistants.

7. Mr. Alexander L. Stevas, when Assistant United States Attorney in charge of the Grand Jury Division, instructed Mr. Stitely and his assistants to type on the statement, Form No. USA-9x-65, the following: "The following is a summary of the witness' conversation not read to or by the witness. It is not intended to be a substantially verbatim account," followed by his initials.

8. The clerk sees all witnesses in one case in a group, but takes their statements individually.

9. Mr. Stitely will usually either type the statement in full after the witness has completed his statement or type a portion of it after the witness has partially completed his statement, completing the statement after the witness has given the remainder. One of these procedures was followed in this case and the witnesses remained in Mr. Stitely's office until he completed the statement he took from the witnesses.

10. The Assistant United States Attorney uses the statement as transcribed by the clerk to make an orderly presentation of the evidence to be offered through that witness to the Grand Jury.

11. The statements are taken by the Grand Jury Clerk for the following reasons:

(a) To aid the Assistant United States Attorney in presenting the case to the Grand Jury in an orderly fashion;

(b) To enable the indictment writer to properly draft

the indictment, without the necessity of requiring the transcription of the Grand Jury testimony;

(c) To enable the Assistant United States Attorney, who is assigned to try the case, to prepare and present it in Court. The statements are, on occasion, used to impeach the witness.

12. Mr. Robert X. Perry presented this case to the Grand Jury (Exhibit 5). Should any inconsistencies, which Mr. Perry deemed material, have come to his attention, he would have corrected them. Mr. Perry made the following corrections, relative to the statements in question:

(a) The symbol for the Greek letter delta was inserted to indicate the defendant in line 8 of the first long paragraph of Mr. Butler's statement, next to the word "his".

(b) The abbreviation "MS" was changed to "MF".

13. In taking the statements it was not Mr. Stitely's intention to record an account which would be "substantially verbatim." By "substantially verbatim" he testified that he meant exactly identical.

14. Mr. Stitely has been employed by the United States Attorney's Office, Grand Jury Division, as a clerk for the past 33 years. He is presently the Chief Clerk and has so been for the last five years. Mr. Stitely is a graduate of the National Law School. His civil service classification is GS-9. His principal duties are the taking of statements of witnesses prior to their testifying before the Grand Jury. Exhibits 3 and 4, in this case, were taken by Mr. Stitely.

15. Mr. Stitely corrected the statement of Mr. Butler (Exhibit 3), by changing the sentence "then at one time he threw a glass of beer on the floor and broke the bottle and glass" to the following: "then at one time he threw a glass of beer on the floor and the bottle too." These were the only changes made by Mr. Stitely regarding Mr. Butler's statement, and were made on the typewriter.

16. Where the witness used obscene language, Mr. Stitely used abbreviations.

17. The evidence shows that the statements (Exhibits

#3 and 4), taken by Mr. Stitely, were not read to or by Mr. Butler or Mrs. Smith, nor were they seen or signed by either witness, nor in any way adopted or approved by them prior to trial.

18. The evidence shows that none of the handwritten notations on either statement (Exhibit #3 and 4) were those of either Mr. Butler or Mrs. Smith, but were the notes of Mr. Stitely and Mr. Perry.

19. The evidence shows that the statements taken by Mr. Stitely were not substantially verbatim, but were merely Mr. Stitely's summary of the witnesses accounts of the crime and contained only the substance, essentials and highlights of the account. The statements were written in a third person narrative, and not in the language of witnesses Butler or Smith, except where quotation marks appear. Mr. Stitely never records anything that the witness does not say and never changes the witnesses' wording where to do so would materially alter the purport of the witnesses' statement. It was not the intention of the Clerk to take full detailed statements, but only sufficient facts so that the Assistant United States Attorney appearing before the Grand Jury could make an orderly presentation.

20. The statements of Mr. Butler and Mrs. Smith, as recorded by Mr. Stitely (Exhibits 3 and 4) were read to the witnesses at the hearing before this Court. Each witness testified that his respective statement represented the substance of what he had told Mr. Stitely. Mrs. Smith qualified her testimony by noting that her statement did not contain one item that she recalled she narrated to Mr. Stitely: the fact that Butler had fired a warning shot into the mirror prior to shooting Williams.

21. The witnesses Smith and Butler testified at the hearing before this Court as to their version of the occurrences on the evening of the alleged crime.

22. In this case, the record of the statement which Mrs. Smith gave to Mr. Stitely (Exhibits 3 and 4) recites that it is the "substance" of her testimony.

23. The failure to produce Exhibits 3 and 4 for use of

defense counsel during the trial was not prejudicial to defendant.

24. The witnesses statements before Mr. Stitely, the Grand Jury, the petit jury and this Court are not significantly different. Any discrepancies are attributable to the incomplete nature of the statements recorded by Mr. Stitely.

25. The evidence shows that impeachment of either witnesses Butler's or Smith's credibility at trial could not have been accomplished by the use of the statements (Exhibits #3 and 4).

WHEREFORE, the Court concludes as a matter of law that:

1. The duty of determining whether or not statements are producible under the Jencks Act rests upon the Court.

2. Neither of the statements was read to or by the witnesses or signed or otherwise adopted by them within the meaning of Subsection (e)(1) of the Jencks Act, 18 U.S.C. § 3500, and thus were not producible at trial.

3. Both statements were "recorded contemporaneously" with their "making", however, neither was "a substantially verbatim recital of an oral statement made by" the witness within the meaning of Subsection (e)(2) of the Jencks Act, and thus were not producible at trial.

4. No prejudice resulted to the defendant as a result of not having the statements at trial (assuming *arguendo* they were producible).

5. The judgment of conviction and sentence should stand.

/s/ H. A. SCHWEINHAUT,
Judge.

FEBRUARY 13, 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 733152 1017